

## Does the Fiduciary Exception to Attorney-Client Privilege Apply to Communications Between the U.S. Government and an Indian Tribe?

### CASE AT A GLANCE

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As a fiduciary, the secretary of the interior and his staff holds, in trust, certain funds of the Jicarilla Apache Nation, which are derived from natural resources mined from tribal land. The tribe sued the United States to compel an accounting of the fund. The issue is whether the tribe can invoke the fiduciary exception to the attorney-client privilege, under which a fiduciary may not shield from trust fund beneficiaries communication with its attorneys on fiduciary matters, in order to compel the production of documents about Indian trust funds managed by the secretary of the interior.

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### *United States v. Jicarilla Apache Nation* Docket No. 10-382

**Argument Date: April 20, 2011**  
**From: The Federal Circuit**

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### ISSUE

When the United States acts as a fiduciary to an Indian tribal trust fund, is the “real client,” for purposes of invoking the attorney-client privilege, the government or the Indian tribe?

### FACTS

The Jicarilla Apache Nation (the tribe) owns a 900,000-acre plot of land in New Mexico; the land contains timber, gravel, and oil and gas resources. The secretary of the interior and his designees hold revenues derived from the land in trust for the tribe and, in a fiduciary capacity, manage the trust fund.

The tribe sought an accounting of the trust fund because it believed that the government had mismanaged the funds and had breached its fiduciary duty to the tribe. The tribe alleged that the United States did not maximize returns on the funds, failed to pool assets with other funds, and invested too deeply in short-term maturities.

From December 2002 through June 2008, the parties engaged in alternative dispute resolution. During this time, the government gave the tribe thousands of documents; however, the government withheld 226 documents, claiming that the documents contained privileged information under the attorney work product doctrine, attorney-client privilege, or the deliberative process privilege. This included documents exchanged among the U.S. Department of the Interior, the Office of the Solicitor, and various agencies including the Bureau of Indian Affairs. The tribe asked the court to place the case on its active case calendar and filed a motion to produce the documents. The government filed its response as well as a privilege log. In addition, the government produced 71 of the 226 documents after withdrawing claims of the deliberative process privilege.

The U.S. Court of Federal Claims held that the government could not withhold documents under the attorney-client privilege because, as the beneficiary of a trust fund managed by the U.S. government, the tribe fell within the fiduciary exception to the attorney-client privilege. This exception allows a trust beneficiary to gain access to attorney-client communications that relate to fiduciary matters.

The court classified the documents into five categories. The first included documents from personnel in various Interior agencies requesting legal advice from the Interior’s Office of the Solicitor; these documents directly or indirectly related to the tribal accounts. This category included 20 documents, six of which were exact duplicates of documents already produced. The court held that the fiduciary exception applied to all of the documents in this category, except the duplicates, because they related to the administration of tribal trusts and the tribe’s investments.

The second group of documents included legal advice provided by the Solicitor’s Office or other government offices over a 75-year span. This was the largest group of requested documents and included 83 pages. Most of this information was related to the legality or appropriateness of investment strategies. The court ordered the production of these documents under the fiduciary exception.

The third set of documents included contracts between accounting firm Arthur Andersen, Inc., and the Interior. Eighteen documents were classified in this category, all of which the government sought to withhold under the work product doctrine. The court agreed that the work product doctrine protected these records.

The fourth category of documents contained information on anticipated or pending litigation with other tribes prepared by the Interior or Solicitor's Office. This category included 25 documents. Twenty-one of these documents were prepared in anticipation of litigation with other tribes and, therefore, according to the court, were protected under the work product doctrine.

The fifth and final group was a hodge-podge of nine documents that do not readily fit into the other four categories. Two of these documents were emails discussing the request for legal advice, another two related directly to fund management, three documents were merely cover sheets, and the final documents were duplicates of previously produced documents. The court ordered the production of the cover sheets because they were not protected either by the attorney-client privilege or the work product doctrine. The court also ordered production of documents that related to the tribe's investments because these documents fell under the fiduciary exception.

The United States appealed, seeking a writ of mandamus from the Court of Appeals for the Federal Circuit on the grounds that the "fiduciary exception does not apply to [the government] because its relationship to the tribe is different than a traditional fiduciary relationship." *Jicarilla v. United States*, 590 F.3d 1305 (Fed. Cir. 2009). Noting that this is a case of first impression, the Federal Circuit denied mandamus and upheld the lower court's opinion. The court held that a tribal trust was sufficiently analogous to a private trust so as to justify the application of fiduciary exception. In fact, the court asserted, the Supreme Court has analogized the relationship of the federal government to Indian tribes as a "ward to his guardian." Because the government was consulting with attorneys for the ultimate benefit of the beneficiaries, the beneficiaries were the real clients. The court held that, "the United States cannot deny an Indian tribe's request to discover communications between the United States and its attorneys based on the attorney-client privilege when those communications concern management of an Indian trust and the United States has not claimed that the government or its attorneys considered a specific competing interest in those communications." The court dodged the question of whether the fiduciary exception applies to work product documents.

The court relied on the *Restatement (Third) of Trusts* to hold that the United States, as a trustee for the tribal fund, has a general fiduciary duty to disclose "information related to trust management to the beneficiary Indian tribes, including legal advice on how to manage trust funds."

The government filed a petition for rehearing, but in the meantime the Court of Federal Claims issued a protective order that preserved the government's privilege and prevented disclosure to third parties. With these protections in place, the government produced the requested documents and filed a petition for certiorari to determine whether the privilege applies.

## CASE ANALYSIS

The attorney-client privilege allows clients to keep private confidential information discussed during consultation with lawyers. The privilege allows open dialogue between an attorney and his or her client so that the client is comfortable disclosing all relevant information and the attorney can provide accurate legal advice based on this information.

Such communications can only be revealed if the client waives the attorney-client privilege.

In cases involving a trust fund, the issue is who is the client: the fiduciary or the beneficiary? An exception to the attorney-client privilege exists in the context of fiduciary relationships due to this concern. The fiduciary exception is premised on the belief that the beneficiary is the ultimate client; therefore, the exception grants the beneficiary access to attorney-client communications between the fiduciary and an attorney when the communications relate to plan administration.

Both parties argue that they are the "real client." The tribe contends that because the purpose of the attorney-client communication was to discuss the interests of the beneficiaries (i.e., the tribe), the tribe should be granted access to the communications. In contrast, the government argues that because it was acting in its capacity as a sovereign entity, the government lawyers are not representing the tribe, but are acting on behalf of the U.S. government.

The government bolsters its argument by pointing out that the government attorneys are paid by the government, not by the trust fund. Additionally, the government contends that the trust fund records belong to the government, not the tribe. The government, therefore concludes that only the government can assert a privilege with respect to the records.

The government's position is further reinforced by a 1979 letter from Attorney General Bell to the Department of the Interior. The attorney general clarified that government attorneys represent the government, not the tribes: "[T]he Attorney General is attorney for the United States in these cases, not a particular tribe or individual Indian. Thus, in a case involving property held in trust for a tribe, the Attorney General is attorney for the United States as 'trustee,' not the 'beneficiary.' He is not obliged to adopt any position favored by a tribe in a particular case."

The government contends that the Federal Circuit erred by abrogating the attorney-client privilege in relation to tribal property. The government analogizes the attorney-client privilege to the Freedom of Information Act Exemption 5, which exempts from mandatory disclosure the production of "inter-agency or intra-agency memorandums or letters, which would not be available by law to a party other than an agency in litigation with the agency." Courts have held that such memoranda issued by government agencies are protected under attorney-client privilege.

The government argues that the Federal Circuit's ruling presents ethical dilemmas for government lawyers who may have a conflict between tribal and governmental interests. For example, the government attorney's advice to the tribe may be directly adverse to its advice to another agency, such as an environmental control agency. Private attorneys may face similar quandaries, but unlike the government, private fiduciaries have the option to hire independent counsel to avoid such conflicts. The government, therefore, contends that the fiduciary exception to attorney-client privilege is inapplicable to the government because government lawyers represent clients with competing interests.

The tribe explains that the attorney-client privilege was crafted to assure open and honest communication between the attorney and his

or her client to ensure frank communications so that the attorney can provide informed legal advice. The tribe contends that the attorney-client privilege is inappropriate in the context of government officials communicating with government attorneys about the management of tribal funds because, unlike a private attorney, a government attorney's loyalties do not lie solely with the client-agency, but with the public interest.

The tribe states that the "fiduciary exception rests on two foundations. First, the fiduciary acts as a proxy for the beneficiary who is the 'real client' for whose benefit the advice was sought. Second, the fiduciary has a duty to disclose all information related to trust management to the beneficiary." The duty to disclose, argues the tribe, is a duty imposed on all fiduciaries of trust funds in order to allow a beneficiary to detect a possible fiduciary breach. The tribe emphasizes that "the attorney-client privilege should not be used as a shield to prevent disclosure of information relevant to an alleged breach of fiduciary duty." (citing *Bland v. Fiatallis N. America, Inc.*, 401 F.3d 779 (7th Cir. 2005).)

Historically, Indian tribes have been subject to paternalistic governmental oversight and the government has placed their assets and earnings under trust, exercising "pervasive control" over tribal funds. Over time, tribal communities have become increasingly reliant on the government to exercise its fiduciary duties in good faith. The tribe argues that the government's fiduciary duties do not disappear simply because it is also a sovereign. In this case, according to the tribe, there are no competing interests to be advanced by the government in its capacity as a sovereign: the government is merely executing traditional trustee functions by managing the tribal trust funds.

## SIGNIFICANCE

Although it is easy to conclude that this case is only applicable to discovery issues relating to tribal funds held in trust by the U.S. government, the case has broader implications, especially in the area of employee benefits and shareholder actions. This will be the Court's first opportunity to address the fiduciary exception to the attorney-client privilege and it can easily have an impact beyond tribal funds.

The fiduciary exception to the attorney-client rule is frequently invoked in employee benefit cases where the trustee's real clients are the beneficiaries of the trust. Oftentimes, beneficiaries of employee benefit plans do not have ready access to documents relating to the management of the fund. The privilege is also summoned in derivative litigation, where the directors sue the corporation for breach of fiduciary duty. Shareholders simply do not have access to information about corporate mismanagement. The fiduciary exception, along with the corresponding duty to disclose, gives these beneficiaries the authority to demand documentation of communications between the fiduciary and his or her attorney in cases where a breach of fiduciary is alleged. Without the fiduciary exception, fiduciaries of trust funds and directors of corporations could hide any evidence of their own wrongdoing from the ultimate beneficiary.

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*PREVIEW of United States Supreme Court Cases*, pages 296–298.  
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